No. 258

In the Supreme Court of the United States

OCTOBER TERM, 1952

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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OPINION BELOW

The opinion of the district court (R. 145–149) is reported at 105 F. Supp. 631. The report of the Interstate Commerce Commission (R. 9–44) is reported at 279 I. C. C. 671. The report of the Commission on reconsideration (R. 60–65) is reported at 284 I. C. C. 206.

JURISDICTION

The final judgment of the three-judge district court was entered on June 18, 1952 (R. 146, 149).

The petition for appeal was allowed on July 3, 1952 (R. 151–152), and this Court noted probable jurisdiction on October 13, 1952 (R. 155). The jurisdiction of this Court is conferred by 28 U. S. C. 1253 and 2101 (b).

QUESTIONS PRESENTED

A complaint filed with the Interstate Commerce Commission on behalf of shippers attacked existing freight rates as "unjust and unreasonable," and asked the Commission to prescribe "just and reasonable" rates. During the hearings complainant proposed specific rates. The carriers introduced some evidence relating to costs, but did not offer any general over-all cost study, either at the hearings or during the 18 months between their closing and the decision of the Commission. The Commission prescribed rates which were lower than those in existence but higher than those requested by complainant. Three months after the Commission's decision the carriers filed a petition for rehearing in which, for the first time in the proceedings, they alleged that the rates were confiscatory, and sought leave to offer cost studies in support of that contention. The Commission denied the petition. The questions presented are:

1. Whether the Commission abused its discretion in denying the petition for rehearing.

2. If the answer to question 1 is "No," whether the district court correctly refused to remand the

case to the Commission to receive the railroads' additional cost evidence.

STATUTE INVOLVED

Pertinent provisions of the Interstate Commerce Act are set forth in Appendix A, *infra*, pp. 44–47.

STATEMENT[1]

The proceeding was instituted by a complaint filed with the Interstate Commerce Commission on September 13, 1948, by Texas Citrus and Vegetable Growers and Shippers[2] against a number of railroads serving Texas (R. 9–10). The complaint alleged that the carload rates on vegetables from Texas to points outside Texas were unreasonable in violation of Section 1 of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1, *et seq.*, and unduly prejudicial to Texas growers and shippers and unduly preferential of growers and shippers in Arizona, California and New Mexico in violation of Section 3 (R. 4–5, 10). The gravamen of the complaint was that the rates from Texas were higher than the comparable rates

[1] The record of the proceedings before the Commission is not a part of the record on appeal in this case, since the Government made its motion to dismiss before the record of the Commission's proceedings was filed with the district court. Certain of the pleadings and orders in the Commission proceedings, however, were attached to appellant's complaint, and are a part of the record on appeal. The factual statements herein are, as far as we know, undisputed.

[2] A membership corporation whose members are Texas vegetable growers and shippers (R. 82).

from Arizona, New Mexico and California (R. 11–12). The complaint requested the Commission to prescribe lawful rates for the future (R. 5, 10).

Hearings on the complaint were held in Harlingen, Texas, and Los Angeles, California, in June 1949 (R. 84, 90). During the four days of hearings, 115 exhibits, many of great length, were introduced, and more than 600 pages of testimony were taken (R. 84, 90, 121). Detailed evidence was introduced relating to the movement of a number of different vegetables from Texas and from Arizona, California and New Mexico to numerous points throughout the country. This evidence related to the volume and frequency of such shipments (R. 12–14, 19, 22, 24–26, 28, 37–38), the distances involved (R. 13, 23–25, 27, 40), the rates at which the shipments moved[3] (R. 15–17, 21, 23–25, 27–28, 41), the wholesale selling prices of the vegetables (R. 19–20, 22, 27), the competitive situation between the Texas and the western producing areas (R. 33–34), and competition between railroads and trucks (R. 34–35).

The railroads introduced evidence relating to alleged higher costs on perishable freight, in-

[3] The carload rates on vegetables from Texas to various destinations were based on the application of varying percentages of the first class rates (R. 15). *Southwestern Vegetable Case*, 200 I. C. C. 355, 209 I. C. C. 606, 214 I. C. C. 63. The rates were figured in cents per hundred pounds, with different minimum weights for particular commodities (R. 15).

cluding vegetables, resulting from the need to use refrigerator cars and to meet schedules (R. 30). They also introduced evidence purportedly showing high loss and damage claims incurred in the transportation of vegetables (R. 30–31). The railroads did not, however, offer or introduce any general evidence relating to their costs of transporting the Texas vegetables involved in the proceeding.

During the course of the hearings, the complainant proposed specific rates in lieu of the rates then in effect (R. 17–18, 27, 91, 124).

The examiner filed a proposed report (R. 10) in which he recommended rates which were below those then in effect but higher than those suggested by complainant (R. 113).[4] Exceptions to the examiner's report and requested findings were filed by the participants in the proceedings, and oral argument was held before the full Commission (R. 10, 84, 91, 119). Neither in their exceptions nor during the argument did appellants urge that either the rates suggested by complainants or those proposed by the examiner were confiscatory, nor did they seek leave to reopen the hearing to introduce additional evidence relating to their costs.

[4] The examiner's report, which is a public document of the Commission, is not a part of the record on appeal. Pertinent portions of the report are set forth in Appendix B, *infra*, pp. 48–51.

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On December 21, 1950, the Commission issued its first report in the proceedings.[5] The Commission found that certain of the rates on vegetables from Texas were unreasonable (R. 43–44). The Commission further found that, although the Texas rates were relatively higher than those from California and Arizona, the allegation of undue prejudice and preference had not been sustained because of the absence of "persuasive evidence" as to the "specific effect" of the discrepancies "on complainant's members' ability to sell in those markets" (*ibid.*).

In its report, the Commission made extensive findings relating to all aspects of the movement of vegetables from Texas (see *supra*, p. 4). The Commission considered the railroads' evidence relating to the alleged higher costs of transporting vegetables because of the need to move them in refrigerator cars and to meet shipping schedules, but concluded that there was no evidence that these conditions "are peculiar to the vegetable traffic from Texas" (R. 30). It also examined the evidence relating to the railroads' contention that loss and damage claims on the Texas traffic were "much higher" than in previous years (*ibid.*), but found that this claim was not sustained by the record (R. 31).

[5] Four Commissioners joined in the report. Two Commissioners joined in a brief concurring opinion, and one Commissioner filed a brief opinion concurring in part. Four Commissioners dissented without opinion. (R. 44.)

The Commission entered an order directing the railroads to put new, lower rates into effect by April 7, 1951 (R. 46–47). The new rates were somewhat lower than those recommended by the examiner, but higher than those requested by complainant (R. 91, 120).

On March 19, 1951 (R. 69)—approximately three months after the Commission had issued its report and order, and 21 months after the hearings had closed—appellant railroads filed a petition for "further hearing and reconsideration" (R. 48). They alleged that the new rates prescribed by the Commission were "less than the costs of providing the service covered by the rates" and were "confiscatory of the property of petitioners, and of each of them" in contravention of the Fifth Amendment of the Federal Constitution (R. 50). The railroads stated that if a further hearing were granted, they would introduce evidence "to show that the costs to them of providing the service covered by the rates prescribed by said order of December 21, 1950, are substantially in excess of such rates * * *" (R. 51). They further alleged that the cost evidence they desired to introduce "was not available to them at the time of the prior hearings" (*ibid.*), and that their previous failure to introduce cost-of-service evidence did not foreclose them from introducing it at a further hearing because they "could not properly assume that the Commission would pre-

scribe rates lower than the costs to defendants of rendering the service" (*ibid.*). Attached to the petition were several appendices (R. 54–58) setting forth statistical data described as "generally indicative" of the cost evidence which the railroads sought to introduce to show that the new rates did not cover the cost of service (R. 51).

On August 1, 1951, the Commission denied the request for a further hearing (R. 61), but reopened the proceeding "for reconsideration on the record as made" (R. 59). On reconsideration, the Commission modified some of its prior findings "principally as to form" (R. 60)[6] in order to clarify certain of the prescribed rates (R. 63).[7] In general, however, the rates were substantially the same as those previously determined (*ibid.*). In its report, the Commission noted that the rail-

[6] The Commission did, however, make certain changes in the substance of its decision. In its original decision the Commission had found that the west-bound rates from Texas to points in California and Arizona were "substantially higher" than the east-bound rates from those points to Texas (R. 37), and that there was no showing of transportation conditions sufficient to justify the discrepancy (R. 38). The Commission accordingly ordered that such west-bound rates should not exceed the east-bound ones (R. 47). On reconsideration, however, the Commission "reexamined the evidence" on this issue (R. 63), and concluded that the record was inadequate to permit the prescription of maximum reasonable west-bound rates (R. 63–64).

[7] Five Commissioners dissented on the ground that the new rates were "lower than the record warrants" (R. 64). None of the dissenting Commissioners, however, disagreed with the Commission's denial of a further hearing.

roads' petition did not "point to any lack of support in the record for the findings made in our prior report" (*ibid.*). The Commission stated that the general freight rate increases authorized by it in *Ex Parte 175, Increased Freight Rates, 1951*, 281 I. C. C. 557,[8] could be added to the rates prescribed (R. 64).[9]

The railroads then brought this action in the United States District Court for the Eastern District of Missouri to set aside and enjoin en-

[8] In the *Ex Parte 175* case referred to by the Commission, decided August 2, 1951, a 6% general increase (maximum 6 cents per hundred pounds) was allowed on the rates involved in this case. 281 I. C. C. 557, 640–641. On April 11, 1952, the Commission granted a further general rate increase in *Ex Parte 175* which, together with the increase previously allowed, resulted in a total increase of 15% in the rates prescribed by the Commission in the case at bar, subject to a maximum increase of 12 cents per hundred pounds. 284 I. C. C. 589, 662.

[9] The Commission's order on reconsideration, issued on January 7, 1952, directed the railroads to establish the new rates by April 24, 1952 (R. 67–68). In response to a petition by complainant to advance the effective date thereof to March 15, 1952 (R. 69), the railroads petitioned the Commission to "reopen this proceeding for further hearing to receive cost evidence which would show the confiscatory nature of the prescribed rates," and to postpone the effective date of the order (R. 71). Both petitions were denied by the Commission on March 7, 1952 (R. 81). On March 11, 1952, the Commission postponed the date for establishment of the new rates to June 23, 1952 (R. 75). The order of the district court dismissing the railroads' petition to set aside the order was entered on June 18, 1952 (R. 146, 149). An application for a stay of the Commission's order was denied by Mr. Justice Clark on July 16, 1952, and the lower rates were put into effect shortly thereafter.

forcement of the Commission's order of January 7, 1952. The amended complaint (R. 73–80) alleged that the Commission's refusal to grant a rehearing and permit introduction of cost evidence was "arbitrary and capricious" and an abuse of discretion in violation of Section 17 (6) of the Interstate Commerce Act, and deprived the railroads of their property without due process of law in violation of the Fifth Amendment (R. 78). The complaint stated that at the hearing before the court the railroads would introduce the cost evidence "which the Commission refused to hear" (R. 79).

Motions to dismiss were filed by the Government (R. 94) and by the complainant (R. 83), which had intervened in the court proceedings (R. 82–83). The motions alleged that the complaint failed to state a cause of action. The railroads then filed a motion requesting the court to stay the cause but retain jurisdiction, and to remand the proceedings to the Commission "for the sole purpose of an administrative determination" by the Commission "of the costs of transporting [the] vegetables [involved]" (R. 96).

After hearing argument (R. 108–144) the district court granted the Government's and complainant's motions to dismiss, denied the railroads' motion to remand, and dismissed the complaint (R. 149). The court held that the railroads were not entitled to a trial *de novo* on the issue of confiscation at this stage of the

proceedings (R. 147). Noting that the railroads "do not here contend that the rates are not just and reasonable based on the record" (R. 147), the court stated (R. 148–149):

> The complaint before the Commission dealt only with rates and the plaintiffs here were therefore on notice of the rates sought and were required to answer that complaint before the Commission. The plaintiffs here seek to relitigate a factual question involved in the proceeding before the Commission on which they initially elected not to present evidence. Cost of service has long been recognized as an important element in the reasonableness of any rate. * * * The pertinent evidence bearing on the issue of confiscation should have been submitted to the Commission in the initial hearing, but was not. Such testimony will not be received by the District Court in this suit.

SUMMARY OF ARGUMENT

I

A. Appellants' petition for rehearing did not make an adequate explanation as required by the Commission's Rules of Practice, as to "why such [additional] evidence was not previously offered." The petition did not state that the evidence was newly discovered, or that it related to a change in economic conditions. It merely alleged that appellants could not foresee that

the Commission would prescribe rates claimed by appellants to be lower than the cost of rendering the service.

During the hearings, complainant announced the rates which it was seeking. The examiner recommended rates lower than those in effect. When the Commission handed down its decision, appellants had been on notice for 18 months of the rates which the Commission was being asked to prescribe as just and reasonable. At no time during that period, however, did appellants endeavor to present their cost evidence to the Commission. This Court has consistently held that the granting of a rehearing is a matter within the Commission's discretion. *Interstate Commerce Commission* v. *Jersey City,* 322 U. S. 503, 515–518. The Commission did not abuse its discretion in denying a rehearing in this case.

B. The fact that the petition for rehearing alleged that the rates were confiscatory did not require the Commission to depart from its usual rules of practice and grant a rehearing. Appellants rely on the majority opinion in *Baltimore & Ohio Railroad Co.* v. *United States,* 298 U. S. 349. We believe, however, that the concurring opinion of Mr. Justice Brandeis (joined in by Justices Stone, Roberts and Cardozo) in that case—rejecting the majority view upon which appellants rely—states the rule which should be applied here. We respectfully urge the Court to reexamine the *Baltimore & Ohio* case, and to adopt the reasoning of the four concurring Justices.

In our view—as the concurring Justices in the *Baltimore & Ohio* case argued—the majority opinion in that case failed properly to distinguish between the constitutional question whether the prescribed rates are so low as to deny the railroads just compensation, and the procedural question whether appellants "are barred from complaining in this suit, because they failed seasonably to raise, before the Commission, that issue and present there the evidence in support thereof." 298 U. S. at 382. A constitutional right may be forfeited "by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States,* 321 U. S. 414, 444. This doctrine has repeatedly been applied to bar judicial consideration of a wide variety of constitutional objections not seasonably raised in the lower tribunal including, in *United States* v. *Capital Transit Co.,* 338 U. S. 286, the contention (not made before the Interstate Commerce Commission) that rates fixed by the Commission were confiscatory. If a litigant can be thus foreclosed from even *asserting* a constitutional right, *a fortiori* he can be barred from introducing additional evidence bearing on that right by failure to make a timely offer of such evidence.

The timeliness of the claim of confiscation and the request to submit additional evidence can be determined only in the light of all the facts in

the case, including compliance or non-compliance with the agency's rules of practice. Appellants could not go through an entire administrative proceeding, take their chance on a favorable decision, and then reopen the record "for the introduction of evidence long available and susceptible of production months before the Commission acted." *United States* v. *Northern Pacific Railway Co.*, 288 U. S. 490, 494.

II

If, as we contend, the Commission did not err in refusing to grant a rehearing, the district court properly refused to remand the case to the Commission to receive the additional evidence. *New York* v. *United States*, 331 U. S. 284, on which appellants rely, does not sustain their argument for remand. That case—in which the railroads' petition for rehearing did not seek to introduce additional evidence relating to confiscation—involved only the narrow question whether the district court properly received the evidence or whether, as the Government contended, the court should have remanded to the Commission to receive it. This Court did not have before it—and did not and could not decide—the issue whether the lower court should have remanded if the railroads had belatedly offered the evidence to the Commission and the latter had rejected it. It would be anomalous for this Court to hold that the Commission properly denied the petition for

rehearing, and then to allow the carriers to introduce the same evidence before the Commission on remand. Failure to make timely offer of the evidence to the Commission in the first instance should preclude its introduction at any subsequent stage of the proceedings.

The general rate increases granted by the Commission in *Ex Parte 175*, which are to be applied to the new rates, may reduce or eliminate the loss appellants allege. Moreover, there has been no showing that the increased costs which underlay *Ex Parte 175* are equally applicable to the Texas rates. Since, in the absence of actual operating experience under the *Ex Parte 175* increases, there is no way of knowing whether the new rates will fall below reasonable minimum levels, the present claim of confiscation appears "too speculative" for consideration at this time. *New York* v. *United States, supra.*

ARGUMENT

This appeal involves an order of the Interstate Commerce Commission which prescribed, as just and reasonable, new, lower rail freight rates on vegetables moving from Texas to points throughout the United States. Appellants, as the district court noted (R. 147), do not dispute that the record before the Commission supports its findings that the new rates are just and reasonable. They do not argue that the Commission erred in deciding the case in the first instance upon the record which appellants and complainant had made. Their sole contention is that the Commission im-

properly refused to reopen the record 21 months after it had been closed to permit appellants to present lengthy and detailed additional evidence relating to cost of service which could have been but was not offered at the hearing. The basis for this contention is that the new rates were allegedly confiscatory, and that appellants were not aware of this fact until the Commission fixed the new rates.

It is the Government's position that appellants were fully on notice during the course of the proceedings of the rates which were being sought, that they had ample opportunity to offer cost evidence prior to the Commission's decision, that they failed to make the showing required under the Commission's Rules of Practice to justify a reopening of the record, and that the Commission accordingly did not abuse its discretion in denying rehearing. In these circumstances, we believe that the district court correctly refused to remand the case to the Commission to receive additional evidence.

I

THE COMMISSION DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANTS' PETITION FOR REHEARING AND DECLINING TO REOPEN THE RECORD FOR ADDITIONAL COST EVIDENCE

A. APPELLANTS DID NOT MAKE THE SHOWING REQUIRED UNDER THE COMMISSION'S RULES OF PRACTICE TO JUSTIFY A REOPENING OF THE RECORD

The Commission's Rules of Practice contain specific requirements relating to what must be

shown in a petition for rehearing. Rule 101 (b) provides that when such petition seeks the opportunity to introduce additional evidence

> the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and *explanation must be given why such evidence was not previously adduced.* [Italics supplied.]

We submit that appellants failed to present adequate explanation for their failure previously to adduce the cost evidence, and that the Commission did not abuse its discretion in declining to reopen the hearings to receive the evidence.

The petition for rehearing did not allege that the additional evidence was "in a legal sense, newly discovered," or that it related to "a change in economic or traffic conditions which required that the Commission's conclusion should be changed." Mr. Justice Brandeis, concurring in *Baltimore & Ohio Railroad Co.* v. *United States*, 298 U. S. 349, 387. It merely stated that the evidence which appellants desired to introduce "was not available to them at the time of the prior hearings" (R. 51), *i. e.*, that the cost studies had not then been prepared.[10] The additional evidence related to the revenues which would have been

[10] The petition for rehearing stated that "much" of the cost evidence "has not yet been prepared for the particular roads and periods such evidence will cover" (R. 51). It further stated that if the petition were granted, petitioners would undertake promptly to prepare and present such evidence (*ibid.*).

earned under the new rates (R. 49–50), and the costs of providing the service, which were alleged to be "substantially in excess" of the new rates (R. 51). It was evidence which would have been admissible if offered at the hearing (see *infra*, p. 20). In fact, appellants themselves had introduced some cost evidence at the hearing in an attempt to justify the rate differentials between Texas and far west traffic. That evidence had related to the allegedly higher costs of transporting vegetables in refrigerator cars, the need to meet shipping schedules, and the heavy damage claims arising in recent years from this class of Texas traffic. The Commission considered this evidence, but found it inadequate to justify the Texas rates then in effect.

Appellants sought to justify their delay in offering the evidence on the ground that they "could not properly assume that the Commission would prescribe rates lower than the costs to defendants of rendering the service and, therefore, their omission to introduce cost-of-service evidence at the prior hearings does not foreclose them from offering such evidence of confiscation at a further hearing" (R. 51). The claim of "surprise," however, does not stand up under analysis.

While appellants did not know the precise rates which would be prescribed until the Commission handed down its decision, they were put on notice during the hearings in June, 1949, of

the rates which complainant was seeking.[11] The examiner filed a recommended decision in March, 1950, in which he proposed rates lower than those in effect but higher than those suggested by complainant. When new rates were prescribed by the Commission in its order of December, 1950—rates which, although lower than the examiner's, were nonetheless higher than those sought by complainant—appellants had known for 18 months what rates the Commission was being asked to fix as just and reasonable. Cf. *Washington ex rel. Oregon R. R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 525–528. During that time they had ample opportunity to determine whether the proposed reductions would result in confiscatory rates.

Neither during the hearings, nor in the 18-month interval between their closing and the promulgation of the Commission's decision, did

[11] Appellants argue that the allegation in their complaint in the district court that they "did not, and could not foresee that confiscatory rates would be prescribed by the Commission in its orders" (R. 7) must be taken as true on the motion to dismiss (Br. 17). Insofar as the allegation related to the claim that the rates are confiscatory, it represents a legal conclusion obviously not admitted by the motion to dismiss. This is particularly true where, as here, the Commission found, contrary to the allegation, that the new rates were just and reasonable, *i. e.*, nonconfiscatory (see *infra*, p. 32). The fact that appellants did not know the precise rates which the Commission would prescribe is beside the point. The critical fact is that appellants were on notice of the rates sought by complainant, and could not delay offering additional cost evidence until the Commission decided the case.

appellants endeavor to present their cost evidence to the Commission. They did not seek a continuance of the hearings to prepare cost studies after complainant had proposed its rates. They did not seek a reopening of the record when the examiner made his recommendations. On the contrary, they remained mute on this issue for 21 months, and did nothing to indicate their desire to present additional evidence until 3 months after the Commission had rendered its decision.[12]

In short, appellants' attempt to reopen the record was no more than "a belated offering of evidence in support of a belated contention." Mr. Justice Brandeis, concurring in *Baltimore & Ohio Railroad Co.* v. *United States*, 298 U. S. 349, 388. The complaint before the Commission raised not only the issue that the rates were unduly prejudicial against Texas shippers, but also that they were unjust and unreasonable. Cost of service has always been regarded as a pertinent—although not the sole—criterion in determining whether rates are just and reasonable.[13] Appel-

[12] Rule 101 (e) of the Commission's Rules of Practice provides that "Except for good cause shown," petitions for rehearing or reconsideration must be filed within 30 days after service of an order granting an application, and within 60 days after service of any other decision or order.

[13] *Brownsville Navigation District* v. *St. Louis, B. & M. Ry. Co.*, 274 I. C. C. 5, 15–16; *All Rail Commodity Rates Between California, Oregon, and Washington*, 277 I. C. C. 511, 523–4, 528; see *Alabama Great Southern Railroad Co.* v. *United States*, 340 U. S. 216, 223. Appellants admitted in the lower court that cost evidence was "relevant" in rate proceedings before the Commission (R. 125).

lants themselves had offered some cost evidence at the hearing (see *supra,* pp. 4–5). If appellants had attempted to offer the additional evidence—or had sought a reasonable postponement of the hearing to permit its preparation—there is no reason to suppose that the Commission would have rejected the evidence or denied an appropriate continuation of the hearing.

We submit that the foregoing considerations fully justified the Commission in refusing to reopen the hearings for the introduction of the additional cost evidence. Appellants did not offer a satisfactory explanation, as required by the Commission's Rules of Practice, as to "why such evidence was not previously adduced." The Commission was accordingly acting well within its discretion in denying the petition for rehearing.

This Court has consistently held that the granting of a rehearing is a matter within the Commission's discretion. *Interstate Commerce Commission* v. *Jersey City,* 322 U. S. 503, 515–518, and cases there cited; *United States* v. *Pierce Auto Freight Lines;* 327 U. S. 515. In apparently only one case—*Atchison, T. & S. F. Ry. Co.* v. *United States,* 284 U. S. 248—has this Court treated the denial of a petition for rehearing as reversible abuse of discretion. The *Atchison* case involved a record which, as a result of the intervening depression between its closing in 1928 and the denial of the petition for rehearing in 1931, could not be

"regarded as representative of the conditions existing in 1931. That record pertains to a different economic era and furnishes no adequate criterion of present requirements." (Pp. 260–261.) The *Atchison* case has been "restricted * * * to its special facts" (*Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 515) and obviously furnishes no precedent here where the petition for rehearing made no claim of *any* change in economic conditions. Cf. *United States* v. *Northern Pacific Railway Co.*, 288 U. S. 490.[14]

B. THE FACT THAT THE BELATED ALLEGATION IN THIS CASE WAS AN ALLEGATION THAT THE RATES WERE CONFISCATORY DID NOT REQUIRE THE COMMISSION TO DEPART FROM ITS RULES OF PRACTICE AND REOPEN THE HEARING TO RECEIVE ADDITIONAL COST EVIDENCE

As we have shown in Point A, *supra*, appellants' petition did not make an adequate showing under the Commission's Rules of Practice to justify the delay in offering the cost evidence. Thus, under well established principles, the denial of rehearing was within the Commission's discretion.

[14] In *Northern Pacific*, a rate case, the record was closed in January, 1930. The Commission issued its final order in December, 1931, and in February, 1932, the railroads petitioned for rehearing on the basis of allegedly changed economic conditions. The Commission denied the petition. In holding that the Commission had not abused its discretion in so doing, this Court stated (p. 493):

"Between January 15, 1930 and February 3, 1932 no application based on changed economic conditions was made to the Commission, and that body was allowed to consider the record and prepare a report without notice of any claim in that behalf."

Appellants argue, however, that they were entitled to rehearing despite the lack of such showing because their petition alleged that the rates were confiscatory. In support of this contention, they rely on the majority opinion in *Baltimore & Ohio Railroad Co.* v. *United States*, 298 U. S. 349. We believe, however, that the concurring opinion of Mr. Justice Brandeis (joined by Justices Stone, Roberts, and Cardozo) in that case—rejecting the majority view upon which appellants rely—states the rule which should apply here. We believe, as the four concurring Justices argued, that the majority opinion failed properly to differentiate between the existence of a constitutional right to a judicial determination of the issue of confiscation, and the time when such right must be asserted if it is not to be waived. In our view, sound administrative and judicial practice dictates against applying the majority views in *Baltimore & Ohio* to the facts in this case. We ask the Court to reexamine *Baltimore & Ohio,* and to adopt the reasoning which led the four concurring Justices to the result in that case.

Baltimore & Ohio Railroad Co. v. *United States* involved a proceeding under Section 15 (6) of the Interstate Commerce Act for the division of joint rates between southern and northern railroads. A complaint was filed with the Commission by a group of southern carriers which alleged that the existing division of the

joint rates received by them was not "just, reasonable, and equitable" as required by Section 1 (4) of the Act (R. B. 40).[15] The complaint requested the Commission to prescribe "just, reasonable, and equitable divisions" of such rates for the future, and to make such new divisions retroactive to the date on which the complaint was filed (*ibid.;* 298 U. S. at 355). Extensive hearings were held before an examiner (R. B. 309–1211), the examiner filed a proposed report, exceptions were filed, and the Commission heard oral argument (R. B. 39). In its report the Commission concluded that the existing divisions were unjust and unreasonable, and prescribed new divisions for the future (*ibid.;* 194 I. C. C. 729).

On the northern carriers' petition for reconsideration,[16] the Commission substantially adhered to its previous decision (R. B. 79; 198 I. C. C. 375). The same carriers then filed a second petition for reconsideration. In this petition they alleged for the first time that, on the basis of a cost study attached to the petition, the prescribed divisions were confiscatory (R. B. 16,

[15] References to the record on appeal in the *Baltimore & Ohio* case, No. 312, October Term 1935, are cited as "R. B."

[16] The petition requested the Commission to consider further the evidence already introduced, as well as certain supplemental data which it was stipulated might be considered as evidence (R. B. 80, 1549). The petition did not raise the issue, however, that the divisions were confiscatory.

95). The Commission denied this petition without opinion (R. B. 1629; 298 U. S. at 387).

The northern carriers then filed suit in the district court to set aside and enjoin enforcement of the Commission's order, 298 U. S. at 351. At the trial the railroads offered and the district court received, over the Government's objection (*id.* at 362), substantial evidence *de novo* with respect to the claim of confiscation (R. B. 1212–1548). After hearing this evidence, the district court held that the railroads had not established their claim of confiscation. *Baltimore & Ohio R. Co.* v. *United States,* 9 F. Supp. 181 (E. D. Va.).

On appeal, this Court unanimously affirmed (298 U. S. 349). A majority of five justices (Chief Justice Hughes, and Justices Van Devanter, McReynolds, Sutherland, and Butler) held that the railroads had seasonably raised the claim of confiscation before the Commission, that the district court had properly considered this contention, and that in passing on it the district court had not erred in receiving additional evidence. The majority further held, however, that the railroads' evidence was not sufficient to sustain their contention that the divisions were confiscatory.

Four Justices (Justices Brandeis, Stone, Roberts and Cardozo), concurring, were of the view that the railroads had failed to raise seasonably the confiscation issue before the Commission, and that such failure should have barred the district court from considering the conten-

tion. They accordingly did not reach the merits of the confiscation issue.

The reasoning of the majority opinion (per Butler, *J.*), on the question of confiscation was as follows: Neither Congress nor its agency (the Commission) can finally determine what constitutes just compensation for the taking of property (p. 368). When an owner of property "appropriately invokes the just compensation clause, he is entitled to a judicial determination of the amount. The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved" (pp. 368–369). Raising the confiscation issue on the second petition for rehearing was timely. Since the complaint to the Commission raised no question concerning confiscation "in the constitutional sense" (p. 363), the railroads "could not foresee that confiscatory restitution would be required or that confiscatory divisions would be prescribed; they were not bound, in advance of the Commission's findings and report, to set up a fear of transgression of their constitutional rights" (p. 370). The railroads could not have raised the confiscation issue on the report of the examiners, since that was merely a recommendation by an employee of the Commission (pp. 370–371). No Act of Congress requires carriers, in advance of a suit to set aside Commission orders, to petition the Commission for rehearing (p. 371). The railroads "were not

given and could not obtain a hearing before the commission upon the question of confiscation. Their earlier failure to invoke constitutional protection does not bar this suit" (*ibid.*).

Mr. Justice Brandeis, writing the concurring opinion, was of the view that the railroads were barred from raising the confiscation issue before the district court "because they failed seasonably to raise, before the Commission, that issue and present there the evidence in support thereof" (p. 382). Pointing out that the reasonableness of the underlying rate order was not challenged, he noted that the non-compensatory character of the divisions would be only one of many facts that the Commission was required to take into consideration in determining a fair division (pp. 383–384). Since the second petition for rehearing alleged "no controlling change of condition" and no claim of newly discovered evidence as a reason for reopening the record, the Commission did not abuse its discretion in failing to receive additional evidence or to pass upon the issue of confiscation. Hence the order prescribing new divisions was free of "inherent error" (pp. 388–389).

We think that Mr. Justice Brandeis' view of the *Baltimore & Ohio* case as presenting a procedural rather than a constitutional problem is correct. The constitutional issue of whether the prescribed rates are so low as to deny the railroads just compensation is separate and distinct

from the procedural question whether "they are barred from complaining in this suit, because they failed seasonably to raise, before the Commission, that issue and present there the evidence in support thereof" (p. 382). The majority opinion itself recognized that a litigant may lose the right to a judicial determination of the confiscation issue by failure to raise it seasonably, observing that this right is available where the litigant "*appropriately* invokes the just compensation clause" (p. 368). [Italics supplied.]

The position for which appellants invoke the majority opinion in the *Baltimore & Ohio* case—that because confiscation is a constitutional issue, the Commission or a court is required to receive new evidence on this issue even though the party could have, but failed to, introduce such evidence before the conclusion of the administrative proceedings—has been sharply impaired, if not abandoned, by subsequent decisions of this Court. It is settled today that the limitation of judicial review "to the record taken before the Commission presents no constitutional infirmity." *Alabama Commission* v. *Southern Ry. Co.*, 341 U. S. 341, 348. It is settled, too, "that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved." *Ibid.* No reason appears today to support the argument against applying in rate-making cases, as in others, the rule that "a constitutional right may be forfeited * * * by the failure to make

timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U. S. 414, 444. This doctrine has repeatedly been applied in a variety of situations by this Court and other federal courts to bar judicial consideration of constitutional objections not seasonably raised in the lower tribunal.[17] In

[17] *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 113 (privilege against self-incrimination); *United States* v. *Gale*, 109 U. S. 65 (constitutionality of statute disqualifying jurors); cf. *Bradley* v. *Richmond*, 227 U. S. 477 (failure to participate in hearings on classification of occupations precluded challenge under 14th amendment to plaintiff's classification as a "private banker" under local license tax ordinance).

In several recent statutes Congress has specifically provided, in accordance with well settled judicial practice, that only objections made before the agency can be considered by the reviewing court. See *United States* v. *Tucker Truck Lines*, No. 18, this Term, slip opinion p. 3. In a number of cases under such statutory provisions the courts have refused to consider constitutional objections not made before the agency. *Todd* v. *Securities and Exchange Commission*, 137 F. 2d 475, 478 (C. A. 6); *Halsted* v. *Securities and Exchange Commission*, 182 F. 2d 660 (C. A. D. C.) (contention that agency had no jurisdiction over company because latter not engaged in interstate commerce); *New England Air Express* v. *Civil Aeronautics Board*, 194 F. 2d 894 (C. A. D. C.) (objection to failure to conduct evidentiary hearings); *Western Air Lines* v. *Civil Aeronautics Board*, 196 F. 2d 933 (C. A. 9), certiorari denied Nov. 10, 1952, No. 337, this Term (claim that suspension of airline's certificate of public convenience and necessity constituted taking of property without just compensation). In the *Todd* case the court refused to consider a challenge to the constitutionality of the Public Utility Holding Company Act of 1935, 49 Stat. 838, 15 U. S. C. 79, not made before the agency, even though the latter was not empowered to pass upon the question.

United States v. *Capital Transit Co.*, 338 U. S. 286, it was invoked to preclude consideration of the claim—not made before the agency and first raised in the district court [18]—that a rate fixed by the Interstate Commerce Commission was confiscatory. The Court stated (p. 291):

> the record fails to show that this issue was properly presented to the Commission for its determination. Therefore the question of confiscation is not ripe for judicial review.

Seeking to distinguish the *Capital Transit* decision, appellants argue (Br. 16) that there "the issue of confiscation had not been properly raised before the Commission." But that, of course, is precisely the point here. The result in *Capital Transit* is rendered trivial, we think, if the rule of orderly procedure there announced means only that the issue is "properly raised before the Commission" when it is finally tendered 21 months after the Commission's hearing closes, after the ample time to seek rehearing under the Commission's rule has expired, and without showing previous unavailability of the allegation or the evidence.

While many of the cases dealing with waiver of constitutional rights through failure to make timely assertion relate to situations where the issue was not raised at all in the lower tribunal,

[18] Record on appeal, No. 40, October Term 1949, pp. 7–8, 115.

the rationale of the cases is equally applicable where the contention, although made in the court of first instance, came too late in the proceedings there."[19] *United States* v. *Nudelman*, 104 F. 2d 549 (C. A. 7), certiorari denied, 308 U. S. 589. In either situation, the litigant loses his right to press the constitutional objection if he fails to raise it at the earliest reasonable opportunity to do so. If a litigant can be thus foreclosed from even *asserting* a constitutional right, *a fortiori* he can be foreclosed from introducing additional evidence bearing on that right by failure to make a timely offer of such evidence. Cf. *Colorado Radio Corporation* v. *Federal Communications Commission*, 118 F. 2d 24 (C. A. D. C.).

The distinction between the right to attack a rate as confiscatory and the right to introduce additional evidence in support of that contention is important. In the instant case, for example, appellants could urge before the district court that the rates were confiscatory. But in pressing this contention they were restricted to the record before the Commission. Appellants' right to a

[19] Cf. *United States* v. *Tucker Truck Lines*, No. 18, this Term, holding that an objection to the qualification of the hearing examiner under the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, came too late when made during judicial review. This Court stated that although the irregularity would have invalidated the Commission's order if the Commission had overruled an appropriate objection "*made during the hearings*," it did not void the order "in the absence of *timely objection*." Slip opinion, p. 5; italics supplied.

judicial determination of the issue of confiscation, cf. *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 51–52, does not carry with it any concomitant right belatedly to introduce additional evidence in support of that contention.

Appellant's contention that the rates are confiscatory is but another way of arguing that they are not just and reasonable. For "the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense." *Federal Power Commission* v. *Natural Gas Pipeline Co.,* 315 U. S. 575, 585. In finding that the new rates were just and reasonable, the Commission perforce found that, *on the record before it,* they were not confiscatory. Cf. *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, 607. The way is always open to appellants to challenge the new rates "if, after a fair test, they prove to be below the lowest reaches of a reasonable minimum." *New York* v. *United States,* 331 U. S. 284, 340; Mr. Justice Brandeis, concurring in *Baltimore & Ohio Railroad Co.* v. *United States,* 298 U. S. 349, 383, 391. In such a case, appellants can institute new proceedings before the Commission seeking the prescription of just and reasonable, *i. e.,* non-confiscatory, rates. *Ibid.*

The alleged constitutional issue in this case thus reduces itself to the procedural problem of whether applicants lost their right to introduce additional evidence relating to confiscation when they failed to raise the issue during the 18

months they had adequate opportunity to do so. Perhaps the filing of a complaint seeking Commission prescription of just and reasonable rates may not have put appellants on sufficient notice that possibly confiscatory rates were being sought to require them to make the contention.[20] Once specific rates were proposed, however, it was incumbent upon appellants to present all available arguments or evidence to show that the proposed rates were unjust or unreasonable—including, of course, evidence that such rates would be confiscatory. Appellants had ample opportunity to argue and tender evidence on the issue of confiscation in their exceptions to the examiner's report,[21] in their briefs, or in oral argument. More-

[20] It should be noted, however, that the complaint in this case was based in part on the specific allegation that the Texas rates were higher than corresponding rates on the same traffic from the far-western states. Since the Commission's power to prescribe just and reasonable rates under Section 15 (1) "includes the power to prescribe rates which will substitute lawful for discriminatory rate structures," *New York* v. *United States*, 331 U. S. 284, 346, cf. *Youngstown Sheet & Tube Co.* v. *United States*, 295 U. S. 476, appellants were on notice even then that complainant was asking the Commission to prescribe just and reasonable rates which would eliminate the discrimination by bringing the Texas rates into line with those from the far west area.

[21] Respectfully questioning the view of the majority in the *Baltimore & Ohio* case (298 U. S. at 370–371) that the railroads could not have raised the issue on the examiner's report, we submit that the question whether the examiner's report was merely advisory is irrelevant. The critical issue is whether it constituted sufficient notice to appellants to require them to come forward with their evidence. When the

over, the way was always open for them—at any time prior to decision—to file a petition requesting that the record be reopened to receive the additional evidence. Rule 102, General Rules of Practice Before the Interstate Commerce Commission.

Appellants could not go through a protracted administrative proceeding, contest the case on the merits, let the Commission decide the case on the record they had helped to make, and then, three months after the final decision had gone against them, seek to reopen the entire case to offer evidence which they could and should have previously presented. "[T]he public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact," *United States* v. *Atkinson*, 297 U. S. 157, 159, dictates against such practice.

The statement by this Court in *United States* v. *Northern Pacific Railway Co.*, 288 U. S. 490, 494, is particularly applicable to the case at bar:

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examiner's report in the instant case was filed on March 9, 1950, more than eight months had elapsed since the railroads had been put on notice at the hearings of the rates proposed by complainant. During this interval, they had ample opportunity to study the proposals and to evaluate them in the light of their operating costs.

Moreover, whatever may have been the significance of the examiner's report at the time of the *Baltimore & Ohio* case, it carries considerably greater weight today. Cf. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474.

> * * * the carriers' lack of diligence in bringing this matter to the Commission's attention deprived them of any equity to complain of the refusal of their petition. They sat silent and took the chance of a favorable decision on the record as made. They should not be permitted to reopen the case for the introduction of evidence long available and susceptible of production months before the Commission acted. The denial of a rehearing, in view of this delay, was not such an abuse of discretion as would warrant setting aside the order.

The same considerations apparently underlay the district court's dismissal of the complaint. As Judge Harper stated during the hearing (R. 131):

> if you can proceed as you gentlemen are proceeding in this case, there can never be any end about rate matters. In other words, you hear them, if you are not satisfied, you claim they are confiscatory and delay the matter two or three years, frankly * * * it just doesn't make sense.

Appellants argue that the Commission's decision in this case would require the railroads to prepare complex cost studies in every rate reduction proceeding "if they are to be fully protected from an invasion of their constitutional rights." (Br. 19.) Such alarm, however, is groundless. In the first place, as appellants themselves admit (*ibid.*), such studies would "ob-

viously not be necessary in most cases," since the issue of confiscation is likely to arise only in a small number of rate proceedings. Appellants themselves cite data showing that cost evidence "is not usually necessary" in rate cases before the Commission (Br. 17–18; cf. R. 125). Secondly—and more important—we do not contend that the carriers must offer cost evidence in response to a complaint which merely alleges that current rates are "unreasonable" and seeks the prescription of lower "reasonable" rates. The railroads' obligation to offer the evidence only arises when they are on notice of the precise rates sought. Since cost data are within the carriers' control, they are in the best position to determine whether the rates suggested appear sufficiently close to the confiscatory line to justify the preparation of cost studies.

The question whether the claim of confiscation and the request to submit additional evidence was timely can be determined only in the light of all the facts in the case, including compliance or noncompliance with the agency's rules of practice. Here appellants had ample opportunity to offer such evidence during the 18 months that the proceeding was pending before the Commission, but failed to avail themselves of it.[22] Under such cir-

[22] It is significant in this connection that appellants did submit some cost evidence at the hearings. See *supra*, pp. 4–5. The additional cost evidence relating to the claim of confiscation, while perhaps not merely cumulative, was nevertheless supplementary to that previously offered.

cumstances, we submit that principles of sound administrative procedure compel the conclusion—in accordance with the views of Justices Brandeis, Stone, Roberts and Cardozo—that the attempt to introduce additional cost evidence under the claim of confiscation came too late.

II

THE DISTRICT COURT CORRECTLY REFUSED TO REMAND THE CASE TO THE COMMISSION TO TAKE ADDITIONAL EVIDENCE

Although appellants originally proposed to introduce the additional evidence before the district court (R. 80–81), they shifted their position during the proceedings below and urged the district court to stay the cause and remand to the Commission to receive the additional evidence (R. 96, 126, 135–136).[23] We do not disagree with appellants' contention that, if further cost evidence is to be received, it should be taken by the Commission rather than the district court. However, if we are correct in our view that the Commission did not err in refusing to grant rehearing to receive the evidence, we submit that the district court properly refused to remand the case.[24]

[23] At the hearing in the district court the Government stated that if its motion to dismiss were denied, the matter should be remanded to the Commission (R. 117).

[24] There is some question as to whether appellants' complaint in the district court adequately sets forth a claim that the prescribed rates are confiscatory. This Court has pointed out that in order to invoke the constitutional protection

Appellants rely on *New York* v. *United States*, 331 U. S. 284, 334–336, to support their contention that remand was required (Br. 21–22). In the *New York* case, a rate proceeding, the railroads raised the confiscation point for the first time in a petition for rehearing by the Commission. "But in doing so they rested on the record before the Commission and tendered no additional evidence" (p. 334).[25] The Commission denied the petition. In the district court the railroads introduced, over objection, further evidence relating to confiscation (*ibid.*). In its brief before this Court

against confiscatory rates, "the facts relied on to restrain the enforcement of [such] rates * * * must be specifically set forth, and from them it must clearly appear that the rates would necessarily deny to the plaintiff just compensation and deprive it of its property without due process of law." *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, 447; see *Louisville & Nash. R. R. Co.* v. *Garrett*, 231 U. S. 298, 314–315; *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, 88–89. The general allegation in appellants' complaint that the prescribed rates "will yield to the carriers affected by the order, including plaintiffs herein, and to each of them, revenue less than the costs of providing the service covered by said rates" (R. 79), hardly seems to meet this exacting requirement. Moreover, it is by no means clear that confiscation is shown by the fact that the cost of rendering a particular service exceeds the revenues therefrom, in the absence of a showing that the overall operations of the carrier do not produce a fair rate of return. Cf. *New York* v. *United States*, 331 U. S. 284, 338; Mr. Justice Frankfurter, concurring in *Alabama Commission* v. *Southern Railway Co.*, 341 U. S. 341, 352.

[25] In fact, the railroads stated that the record as made "was as complete as it was possible to present." Record on Appeal, Nos. 343, 344, 345, October Term, 1946, p. 12681.

the Government argued that the district court should not have received the evidence, but should, if the evidence could be presented at all, have remanded the matter to the Commission.[26] The Government did not contend, however, that the railroads would have been foreclosed from introducing additional evidence before the Commission if the district court had remanded.

Thus the narrow question before the Court in the *New York* case was whether the district court properly received the evidence, or whether it should have remanded the case to the Commission. The Court did not have before it—and could not and did not decide—the issue whether the lower court should have remanded if the railroads had belatedly offered the evidence to the Commission in the first instance, and the Commission had rejected it. Holding that remand was, in any event, unnecessary, the Court accepted the Government's view that, in the circumstances there presented, "if the additional evidence was necessary to pass on the issue of confiscation, the cause should have been remanded to the Commission for a further

[26] The Government contended that the district court erred in receiving the evidence because (1) the railroads had stated in their petition for rehearing filed with the Commission that they did not wish to introduce additional evidence, and (2) the doctrine of exhaustion of administrative remedies required that such evidence be presented initially to the agency. Brief for the United States and the Interstate Commerce Commission, Nos. 343, 344, 345, October Term, 1946, pp. 249–253.

preliminary appraisal of the facts which bear on that question" (p. 336).[27]

In the significantly different circumstances of this case, however, if the Commission did not err in rejecting appellants' belated offer of additional evidence, we submit that remand to the Commission is unwarranted. It would be anomalous for this Court to hold that the Commission properly denied the petition for rehearing, and then to allow the railroads to introduce the same evidence before the Commission on a remand by the district court. Since "correct practice requires that * * * all pertinent evidence bearing on the issues tendered the Commission should be submitted to it in the first instance * * *," *New York* v. *United States, supra,* p. 335, failure to make timely offer of such evidence to the Commission in the first instance should preclude its introduction at any subsequent stage of the proceedings.[28]

There appears to be a further infirmity in appellants' challenge to the rates as confiscatory. After appellants had filed their petition to set aside the Commission's order, the Commission on

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[27] It reached that conclusion on the theory that the prescribed rates were interim ones and the Commission "has not finished with this problem" (p. 338). Cf. pp. 40–42, *infra.*

[28] Since appellants do not contend that the district court itself should have heard the additional cost evidence, we do not discuss the issue. We do note, however, that the same considerations against remand that we have set out in the text also dictate against a hearing *de novo* in the district court on the issue of confiscation.

April 11, 1952, granted a further general increase in freight rates in *Ex Parte 175*, 284 I. C. C. 589. This increase is applicable to the rates involved in this proceeding (R. 64). Appellants argued in the District Court that the *Ex Parte 175* increases were granted "to take care of rising costs" (R. 128). However, since the Commission had not decided *Ex Parte 175* when the first petition for rehearing was filed, the cost problem on which that petition was based may have been solved by the general increase granted in *Ex Parte 175*. Thus it may well be that "any loss which would have been suffered" through the rate reductions involved in the instant case "has probably been at least lessened, if not eliminated, by the general rate increase." *New York* v. *United States, supra,* p. 339. Moreover, there has been no showing that the increased cost factors which underlay *Ex Parte 175* are equally applicable to the Texas vegetable rates. In the absence of actual operating experience under the *Ex Parte 175* increases, there is no way of knowing whether the new rates will fall below the minimum reasonable level. The present claim of confiscation would thus appear "too speculative" for consideration at this time. *New York* v. *United States, supra,* p. 339.

The intervening increase in the rates appellants attack serves to heighten the impropriety of their belated effort to present evidence on their alle-

gation of confiscation. The appellants "could of course apply to the Commission to modify the order so as to make it just for the future", "for every rate order is subject to revision at any time upon application to the Commission". *B. & O. R. Co.* v. *United States, supra, at* 382, 384 (concurring opinion). Upon such application, the results of operation under the rates which are in effect could be adduced, and any necessary change in rates would reflect the changed circumstances which are relevant at this late day. On the other hand, acceptance of appellants' contention that the hearings must be reopened to receive evidence which they failed seasonably to produce would make the task of rate determination in cases of this type an unduly extended and uncertain process.[20]

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[20] In *United States* v. *Tucker Truck Lines*, No. 18, this Term, this Court pointed out that "simple fairness" to those engaged in administration and to litigants requires that objections in administrative proceedings be "made at the time appropriate under * * * [the agency's] practice." Slip opinion, p. 4. The fixing of just and reasonable rates under the Interstate Commerce Act involves a balancing of the interests of shippers and carriers. Cf. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 603 Approximately 2½ years elapsed between the filing of the complaint and the prescription of just and reasonable rates by the Commission. During that interval complainant's members continued to ship under rates found by the Commission to be unjust and unreasonable. Their right to relief from such rates should not be further delayed by the railroads' belated attempt to introduce additional evidence.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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DECEMBER 1952.

APPENDIX A

The Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1, *et seq.*, provides in part as follows:

SEC. 1 (4). It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

SEC. 1 (5) (a). All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any

part thereof is prohibited and declared to be unlawful.

SEC 3. (1). It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

SEC. 15 (1). That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions

of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

SEC. 17 (6). After a decision, order, or requirement shall have been made by the Commission, a division, an individual Commissioner, or a board, or after an order recommended by an individual Commissioner or a board shall have become the order of the Commission as provided in paragraph (5), any party thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, make application for rehearing, reargument, or reconsideration of the same, or of any matter deter-

mined therein. Such applications shall be governed by such general rules as the Commission may establish. Any such application, if the decision, order, or requirement was made by the Commission, shall be considered and acted upon by the Commission. If the decision, order, or requirement was made by a division, an individual Commissioner, or a board, such application shall be considered and acted upon by the Commission or referred to an appropriate appellate division for consideration and action. Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply for rehearing, reargument, or reconsideration of a decision, order, or requirement of the Commission or of a division so as to confine such right to proceedings, or classes of proceedings, involving issues of general transportation importance. Notwithstanding the foregoing provisions of this paragraph, any application for rehearing, reargument, or reconsideration of the matter assigned or referred to an individual Commissioner or a board, under the provisions of paragraph (2), if such application shall have been filed within twenty days after the recommended order in the proceeding shall have become the order of the Commission as provided in paragraph (5), and if such matter shall not have been reconsidered or reheard as provided in such paragraph, shall be referred to an appropriate appellate division of the Commission and such division shall reconsider the matter either upon the same record or after a further hearing.

APPENDIX B

Excerpts from the proposed report of Examiner A. J. Banks in Docket No. 30074, *Texas Citrus and Vegetable Growers and Shipper* v. *Atchison, Topeka & Sante Fe Railway Company, et al.* [filed March 9, 1950].

* * * * * *

Rates sought.—In lieu of the numerous alternate combination and joint through rates which apply on the various individual commodities to the numerous destinations herein, complaint seeks three distance scales applicable on all vegetables which would alternate and which would be subject to minima of 20,000 pounds, 24,000 pounds, and 28,000 pounds. These scales are based on the appendix 10 scale in *Class Rate Investigation, 1939, supra.* These rates are proposed to apply on all vegetables in straight or mixed carloads, to all destinations, except points in the Southwest to which low motor competitive rates were established on December 2, 1940, and except that a 15 percent differential is proposed for the distance in the so-called mountain-Pacific territory, west of the eastern boundary of Montana, Wyoming, and New Mexico and west of the eastern one-third of Colorado.

The hauls in so-called differential territory on traffic to Groups A to E are 1,351 miles from Salinas, 822 miles from Phoenix and 331 miles from Grants; those to Groups K to M are 1,168 miles from Salinas, 432 miles from Phoenix, and 331 miles from Grants. Complainant suggests that the proposed

scales apply from individual origins in Texas, except from points in Texas Groups 1, 3 and 4, which groups should have the same rates based on average distances. Representative short-line distances stated in miles from points in Texas to Pittsburgh, are as follows: Harlingen 1,663, Crystal City 1,590, Laredo, 1,622, Corpus Christi 1,551, Eagle Pass 1,633, Farmersville 1,187, Hereford 1,427, Greenville 1,172 and Jacksonville, Tex., 1,183 miles. Jacksonville is a representative point in Group 5; Greenville and Farmersville are representative points in Group 6; and Hereford is a representative point in Group 7. Representative proposed rates appear in the following table.

Distance	Min. 28,000 lbs.		Min. 24,000 lbs.		Min. 20,000 lbs.	
	Rates	Differ.	Rates	Differ.	Rates	Differ.
	Cents	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*
50 miles	28	4	30	5	34	5
100 miles	31	5	35	5	38	6
200 miles	42	6	44	7	49	7
300 miles	52	8	55	8	61	9
500 miles	65	10	70	11	77	12
700 miles	79	12	84	13	94	14
900 miles	92	14	[1] 100	15	110	17
1,200 miles	112	17	[2] 119	18	129	19
1,500 miles	126	19	[3] 133	20	144	22
1,800 miles	138	21	[4] 146	22	158	24
2,200 miles	151	23	160	24	174	26
2,700 miles	163	24	173	26	189	28
3,200 miles	175	26	186	28	203	30

[1] Burlington Shippers' Association proposes 81 cents, minimum 18,000 pounds, and 68 cents minimum 24,000 pounds.

[2] Burlington shippers propose $1.08, minimum 18,000 pounds, and 90 cents, minimum 24,000 pounds.

[3] Burlington shippers propose $1.35, minimum 18,000 pounds, and $1.13, minimum 24,000 pounds.

[4] Burlington shippers propose $1.61, minimum 18,000 pounds, and $1.36, minimum 24,000 pounds. The Burlington shippers propose column 26, minimum 24,000 pounds, on potatoes and column 28.5, minimum 24,000 pounds, on cabbage, to alternate with their proposed scales on all vegetables, referred to in connection with the preceding table. [Mimeographed pp. 4-5.]

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It has been apparent for some time that the system of numerous column rates with meticulously graded minima, and in some instances different column rates in connection with the same minimum, has become outmoded on vegetable traffic not only from

Arizona, California, and New Mexico but also on vegetables from the Southwest as well. This record, however, is not sufficiently comprehensive to afford a basis for the prescription of three alternate distance scales of rates based on minima of 20,000 pounds, 24,000 pounds, and 28,000 pounds, as proposed by complainant. For example, there appears to be no good reason for reducing the assailed ratings of column 33.5 or less in connection with minima of 24,000 pounds or higher. However, the ratings of column 43, minimum 20,000 pounds, on vegetables such as green peas, string beans, lima beans, green beans, and cauliflower, column 40.5, minimum 20,000 pounds, on vegetables such as peppers and tomatoes, and column 38 on certain vegetables, are obsolete by reason of the fact that lower combination rates actually apply on those commodities. The minimum of 16,000 pounds on lettuce is obviously obsolete in the light of *Estimated Weights on Lettuce from Southwest* (I & S No. 5633), decided December 29, 1949, and in the light of the 20,000-pound minimum on that commodity from Arizona and California. Likewise, the minima of 17,500 pounds on parsley, spinach, and similar leafy vegetables is out of line with minima no lower than 20,000 pounds on practically all vegetables from Arizona and California. Column 36 rates, minimum 20,000 pounds, from Texas to official territory east of Illinois, on vegetables such as cauliflower, lettuce, parsley, peas, beans, peppers, spinach, and tomatoes, would compare favorably with the combination rates now actually applied on those vegetables, particularly when the increase in minimum weight is taken into consideration. Uniform rates on all vege-

tables, minimum 20,000 pounds, would alleviate somewhat the present complicated rate structure, particularly on mixed carload shipments.

The Commission should find that the assailed rates are not shown to be unduly prejudicial or unreasonable, except that, on shipments from Texas points to official territory generally east of Illinois territory, the assailed rates on all vegetables, fresh or green (other than cold pack), as described under the heading "Vegetables, fresh or green" in western classification are, and for the future will be, unreasonable to the extent that they exceed or may exceed column 36 rates, minimum 20,000 pounds; provided that those rates shall alternate with lower column rates where not [now] applicable; and provided further, that the above-prescribed column 36 rates shall be based on the first class rates now used as a basis for the present column rates.

An appropriate order should be entered. [Mimeographed pp. 21–22.]

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